SUPREME COURT, U. S.
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No. 372

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

ABRAHAM MAIUS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for A Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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REPLY TO MEMORANDUM IN OPPOSITION

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This Reply Brief is addressed to, and restricted by, two positions taken in the Government's Memorandum in Opposition, since both of these positions, we respectfully suggest, are contrary to face.

I.

The position taken in the declaration made in Footnote 3, page 5, that

> "The District Court on which the Petitioner relied (United States v. Turzynski (N.D. Ill.)), decided June 2, 1967 (20 A.F.T.R. 2d. 5004) is an aberrant opinion".

In point of fact, the reasoning in the *Turzynski* case is quoted and supported by the position taken in the Excise Tax Case of *U. S.* v. *Gower,* decided June 30, 1967, (Dist. Court, Middle Dist. Pa.) 67-2-U.S.T.C. 15,760.

The *Gower* case has been summarized in head note as follows:

> "Criminal Prosecution; Motion to Suppress Evidence; Constitutional Safeguards — The defendant was not adequately advised of his constitutional rights to remain silent and to the assistance of counsel when a civil investigation becomes a criminal investigation. Therefore, evidence obtained at a question and answer session was suppressed because it was obtained in violation of fundamental standards of fairness and did not represent a voluntary action on the part of the defendant."

In the *Gower* case, the court in granting a motion to suppress evidence taken in an interview between a taxpayer and two Revenue Agents, in the absence of counsel, pointed out that *Miranda* (*Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602) recognized that coercion can be mental as well as physical, that the test for coercion can be a subjective one or determined by its effect on a man possessed of average resistance. The court, in its five page opinion, distinguished between preliminary questioning and the turn the case took when the "defendant was taken into a separate conference room in the presence of the two agents and the stenographer, asked to stand and was sworn, and then was subject to series of searching questions, to which he gave incriminating answers".

Moreover, this Court need not be reminded that the appellant in his Brief relied on considerably more than an alleged aberrant opinion. He relied on two factors ignored completely in the Government's Memorandum in Opposition, namely:

A. The language of the Circuit Court's Opinion inviting this petition — (Is this also "Aberrant", in the Government's eyes?), and,

B. The real and pressing problem, attested to by an increasing recognition of the inequitable imbalance which now exists against a taxpayer, when, without benefit of counsel or warning of his right thereof, he is formally and officially "invited" to an incriminating examination by an Intelligence Agent of the Internal Revenue Service. In the present case this imbalance reached an apogee of injustice because of the accumulation of factors, detailed in appellant's Brief, which placed the appellant in position of peril on multiple scores.
(Appellant's Brief, Pages 2 and 3, *Questions Presented*)

II.

The position taken by the Government, in the same footnote, i.e. that the listed cases cover the facts in this case and therefore form an unbroken and formidable phalanx in oppostion to what the appellant herein is asking. In point of fact, not one case applies to the facts in this case.

The distinguishing facts of this case, having been set forth in the appellant's Brief, we shall not repeat them here, but shall, instead, briefly point out the distinguishing facts in the cases cited which make them utterly inapplicable to the case at bar:

U. S. v. *Gleason*, 265 F. Supp. 880 (S.D. N.Y.):

> Inquiry involved two partners, *their own* returns; *their own* books and records, *their books* turned over by *their* own accountant. One was interviewed in *her own* office; the other in a "Revenue Office". No evidence of a double interview, the second one three years into the investigation.

U. S. v. *Fiore,* 258 F. Supp. 435, 440 (W.D. P.A.):

> The defendant herein, to quote the court (page 40) was standing "in the center of the inquiry from the beginning, as the only possible suspect, while as investigation proceed, the ring or evidence expands and builds around him. For this reason, the distinction between 'investigative' and 'accusatoreal' states may not be entirely apposite to criminal tax investigations".

U. S. v. *Schlinsky,* 261 F. Supp. 265 (D. Mass.), affirmed June 6 (C.A. I.) 19 A.F.T.R. 2d, 1597, 1599:

> An agent, assigned *to audit* returns *of defendant* examined *his* books; and took an interview at *his* store, without "stealth, deceit or misrepresentation".

U. S. v. *Hill,* 260 F. Supp. 139 (S.D. Cal.):

> "Except for the occasion on which the constitutional warning was given, all meetings were in the defendant's offices" (page 142) — "There was no stealth, misrepresentation, fraud or deceit on the part of the agents. They told the defendant that they wished to examine *his* financial records in order to effectively investigate *his* tax returns". (page 143) "*He* voluntarily *produced his* records — (page 143) — time between first call "in making a civil audit" of *defendant's* return and last interview: 8 months. (All emphasis added)

U. S. v. *Carlson,* 260 F. Supp. 423 (E.D. N.Y.):

> Actually, the court in this case said: "Whether a person is in custody or not, he is entitled to the assistance of counsel if he is facing an explicit or *imminent* criminal charge." (Emphasis added) "It is logically difficult to determine whether anything more is necessary to ripen the rights to the assistance of counsel and to a warning to that effect than the mere fact that the government is the interrogator and is conducting the

interrogation in the perspective of criminal law enforcement, whether or not it has already resolved to go forward. The cases do not indicate that the standard is the standard applicable to protect persons in custody. *United States* v. *Silverstein*, 2d Cir. 1963, 314 Fed. 2d 789, 890, treats an appearance before a special or the Intelligence Division as in the nature of an appearance in a criminal investigation and it says that a claim of privilege against a summons directing production of individual papers would be sustained in that context. *Russo* v. *United States*, 2d Cir. 1957, 241 F.2d 285, 287, may assume, though without comment, the inadmissibility of disclosures obtained by Treasury Agents by means of deceiving a tax payer into thinking an examination was for the purpose of a routine civil audit rather than for the purpose of a criminal charge". (page 427)

Stern v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.):

A civil action to enjoin presentation of evidence to a grand jury refused because plaintiff did not allege records were not freely given or not obtained by fraud; therefore, he had to convince the court that Escobedo and Miranda applied.

(Present case: Appellant had no records to give and he was lulled into believing he was describing the operation of a former job, — his own returns not being challenged.)

U. S. v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.):

Inquiry involved defendant's personal bank accounts and "the last interview was held on November 12, 1963, at the defendant's home in the presence of his accountant, Mr. David Greenblatt, where questions and answers were recorded and later transcribed. During this interview the defendant was advised of his constitutional rights".

(pages 593 and 594, quoting from the opinion)

U. S. v. *Neves,* (S.D. N.Y.) decided April 28, 1967 (67-1 U.S.T.C. par. 9412):

> Defendant, president of a corporation, gave to Revenue Agents books under his control and later appeared *with his attorney* at offices of Internal Revenue Service, when he gave additional testimony, signed transcripts of questions and answers.

Moon v. *Brennan,* (E.D. Wis.) decided November 21, 1966 (19 A.F.T.R. 2d 641):

> An action to enjoin a District Attorney before evidence presented to a grand jury. The Court said "At the present development of the law, the rules of Miranda, which require that a — in essence, a citizen who is in custody be advised of his constitutional rights, that these have not been expanded to apply to the — to Internal Revenue Agents who are investigating cases".

It is to the fact situation involved herein that this appellant directs this petition. In this case there exists, in an acute form, examples of a widespread condition which is causing increasing alarm. This condition merits the consideration of this Court, because it is a condition so basically unjust that it should be corrected wherever it is uncovered, whether it be before *Miranda* or after *Miranda.*

Hypocracy by Internal Revenue Agents who draw out taxpayers into making incriminating statements under the impression that they are giving "explanations" or "cooperating", should not be permitted to carry the official sanction of this Court. Neither should this Court ignore that an official Government letter, with official Government seal on its letter-head, directing a citizen to appear for an

official interview at a Government office, is to that average citizen an instrument of force which he fears to refuse and which he obeys under the compulsion of that fear.

Respectfully submitted,

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August ....., 1967.